

# Austria



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### 1 Setting the Scene - Sources and Overview

#### 1.1 What are the main corporate entities to be discussed?

The main corporate entities in Austria are the:

- **Limited liability company (*Gesellschaft mit beschränkter Haftung*)**. These are private companies and are mainly small and medium-sized companies because it allows more influence for shareholders.
- **Stock corporation (*Aktiengesellschaft*) (AG)**. These are mainly large companies with a large capital requirement.
- ***Societas Europaea* (SE)**.

Only stock corporations and SEs can be listed on the stock exchange (listed companies). The Corporate Governance Code applies primarily to Austrian stock listed companies and stock listed SEs registered in Austria. Unlisted companies also follow the Code. Austrian companies must commit to the Code to enter the Prime Market at the Viennese Stock Exchange.

Unless otherwise stated, the term company refers to private companies, stock corporations, and SEs (which are likely to play a more important role in the future), as these are most relevant to corporate governance and directors' duties.

#### 1.2 What are the main legislative, regulatory and other corporate governance sources?

Corporate governance is regulated by:

- **Statute**. Regulations on corporate structure, internal organisation, duties and liabilities of the management, and supervisory boards and their directors, accounting responsibility, and corporate restructuring are governed, in particular, by the:
  - Stock Corporation Act 1965 (*Aktiengesetz*);
  - Limited Liability Company Act 1906 (*GmbH-Gesetz*);
  - SE Directive 2001 (*SE-Verordnung*); and
  - SE Act 2004 (*SE-Gesetz*).

Other legislation including:

- General Civil Code 1811 (*Allgemeines Bürgerliches Gesetzbuch*), which deals with general regulations on liability;
- Business Code (*Unternehmensgesetzbuch*) (UGB) (former Commercial Code 1979 (*Handelsgesetzbuch*), which sets out substantive accounting provisions); and
- Labour Constitution Act 1974 (*Arbeitsverfassungsgesetz*), which provides for employee representatives on the supervisory board.

Regulation of listed companies includes the:

- Stock Exchange Act 1989 (*Börsengesetz*);
- Takeover Act 1998 (*Übernahmegesetz*);
- Issuer Compliance Regulation 2002 (*Emittenten-Compliance-Verordnung*); and
- Capital Market Act 1991 (*Kapitalmarktgesetz*).

- **A company's constitution**. The articles of association (articles) and procedural rules for the management and supervisory boards

- **The Austrian Code of Corporate Governance 2002 (Code)**. Revised in January 2010, this provides companies with a framework for corporate management and control. The Code applies primarily to Austrian stock listed companies. However, it covers the general standards of good corporate management in international business practice, as well as most of the important provisions of Austrian company, securities and capital markets law, EU recommendations, and the OECD Principles of Corporate Governance.

The Code is only mandatory for listed stock corporations and listed SEs that have committed themselves to complying with it (Code companies), although unlisted companies are also advised to comply with it. It contains three types of provisions:

- L-provisions, which are mandatory provisions of law;
- C-provisions, which are comply- or explain-provisions; and
- R-provisions, which are recommendations of best practice that are not subject to comply- or explain-requirements.

- **Relevant case law**.

#### 1.3 What are the current topical issues, developments and trends in corporate governance?

##### Act on Amendment of the Austrian Stock Corporation Act 2009 ("*Aktienrechts-Änderungsgesetz 2009*") [ARÄG])

The EC's Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies was formally adopted on 11 July 2007. It assists shareholders of listed companies throughout the EU in exercising their rights.

The Directive:

- Introduces minimum standards to ensure that shareholders of companies whose shares are traded on a regulated market have timely access to relevant information ahead of the general meeting.
- Introduces simple means to vote at a distance.

- Abolishes share blocking.
- Introduces minimum standards for the rights to ask questions, put items on the general meeting agenda, and table resolutions.
- Allows Member States to take additional measures to further ease the exercise of the rights referred to in the Directive.

EU Member States had to implement the Directive 2007/36/EC into their national laws by 3 August 2009 at the latest. The implementation took place with the Act on Amendment of the Austrian Stock Corporation Act 2009, which became effective on 1 August 2009.

The Act on Amendment of the Austrian Stock Corporation Act 2009:

- Minimum notice period of 28 days for annual general meetings, whereby shareholders can vote by electronic means.
- Internet publication of the convocation and of the documents to be submitted to the general meeting.
- Abolition of share blocking and introduction of a record date according to which the shareholder of an Austrian company has to certify the ownership of shares no later than ten days before the general meeting.
- Abolition of obstacles to electronic participation to the general meeting, including electronic voting.
- Mitigation of the minority shareholders' risk to bear the costs of the exercise of shareholders' rights.
- The companies' obligation to answer questions of shareholders in the course of the annual general meeting shall be subject to a court decision in case the answer to such questions is denied.
- Abolition of existing constraints on the eligibility of people to act as proxy holder and of excessive formal requirements for the appointment of the proxy holder.
- Disclosure of the voting results on the company's website.

#### EC-Remuneration Recommendation of 30 April 2009:

- makes the adaption of some Corporate Governance Code regulations necessary; and
- amendments concerned the areas of variable remuneration, share-based remuneration, severance pays, remuneration reports, and remuneration committees.

#### The amendments changed the Corporate Government Code (effective since 1 January 2010).

#### 3rd revision of the capital requirements directive (CRD) 2006/48/EC and 2006/49/EC (Capital Requirements Directive/Basel II).

On 7 July 2010 the European parliament adopted some of the strictest rules in the world on bankers' bonuses. The bonus culture shall and hopefully will be changed and will end incentives for excessive risk-taking.

Caps will be imposed on upfront cash bonuses:

- capped at 30% of the total bonus and at 20% for particularly large bonuses;
- between 20% and 60% must be deferred for at least three years (according to Austrian draft legislation: at least five years) – and can be recovered if investments do not perform as expected; and
- at least 50% of any bonus will have to be paid in contingent capital (= funds to be called upon first in case of bank problems) and shares.

In addition to these provisions, bonus-like pensions are also covered in so far as exceptional payments must be held back in instruments such as contingent capital.

Rules on compensation-schemes became effective as of January 1 2011, but amendments of the Banking Act are still required.

#### Green paper on corporate governance in financial institutions and remuneration policies (COM(2010) 284/3): June 2 2010.

The aim of this paper is to identify and to describe current corporate governance practices in financial institutions and to make suggestions to improve corporate governance. It is a first step towards reform of corporate governance practices in financial institutions.

#### Commission staff working document on corporate governance in financial institutions and remuneration policies (SEC(2010)669) - accompanying Green Paper, June 2 2010.

## 2 Shareholders

### 2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

#### Stock corporations and SEs

One or more shareholders holding at least 5% of the issued share capital can require the calling of a shareholders' meeting or the placing of additional items on a shareholders' meeting agenda (see question 2.6).

One or more shareholders holding at least 10% of the issued share capital can:

- Require a special external auditor to be appointed.
- Require the company to assert damages claims against directors or other shareholders.
- Require the appointment of a different auditor.
- Require a shareholders' meeting to be postponed if they do not agree with some or all of the annual report.
- Apply to a court to remove a supervisory director.

#### Private companies

One or more shareholders holding at least 10% of the issued share capital can:

- Require a special external auditor to be appointed to audit the annual report.
- Require the company to assert damages claims against directors or other shareholders.
- Require the convening of a shareholders' meeting.
- Place additional items on the agenda of a shareholders' meeting.
- Apply to a court to remove a supervisory director.

In any company, one or more shareholders holding at least 25% plus one share of the issued share capital can block a decision requiring a 75% majority of shareholders' votes (for example, changes to the articles and decisions to merge).

See question 2.6.

### 2.2 Can shareholders be liable for acts or omissions of the corporate entity/entities?

No they cannot.

### 2.3 Can shareholders be disenfranchised?

Austrian law is aware of so-called "non-voting preference shares". Often the "non-voting preference shares" of family businesses are